From: Jason Thomas
To: 'microsoft.atr(a)usdoj.gov'
Date: 1/25/02 5:31pm
Subject: Microsoft Settlement

Please consider the attached comments authored by C. Boyden Gray, Chairman of Citizens for a Sound Economy and partner at Wilmer, Cutler, and Pickering.

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Citizens for a Sound Economy...organized Americans committed to preserving our economic freedoms.

CC: Erick R. Gustafson,Paul Hilliar

January 23, 2002

Renata B. Hesse
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To Whom It May Concern:

I write to endorse resolutely the proposed settlement between Microsoft Corporation and the United States Department of Justice. The consent decree agreed to in *U.S. v. Microsoft* enjoins all Microsoft actions that were found to be illegal and imposes severe restrictions on the company and its business practices. The decree is the most forceful and the most regulatory ever negotiated by the U.S. Justice Department, wherein Microsoft agreed to provisions that were substantially more punitive than what plaintiffs could have expected to achieve through litigation. For instance:

- The company is prohibited from exclusive dealing arrangements or any preferential treatment from manufacturers, access providers, suppliers and vendors.

- Manufacturers will retain greater freedom to display non-Microsoft software, and will no longer face the risk of retaliation from Microsoft should they choose to promote products made by Microsoft competitors.

- Should Microsoft fail to abide by any of these restrictions, a committee of experts is to be created that will receive all complaints pertaining to Microsoft's business practices.

- The consent decree runs for five years, with an additional two years if Microsoft is found to be in violation of any of its terms – a lengthy period of time in any industry; more so in an industry as volatile and dynamic as computer software.

Despite all of this, opponents of the decree – which include, not surprisingly, many of Microsoft's industry rivals and their supporters – continue to belabor two points: First, that the Court of Appeals decision that led to this settlement upheld the core argument of the government's case, that Microsoft held a monopoly in operating systems; and second, that the settlement between the company and the government is not only inadequate but unenforceable.

First of all, yes, the Court of Appeals did find Microsoft's exclusive dealings to be monopolistic, which is exactly and specifically what the company has been prohibited from doing in the future, according to the terms of the decree. The current District Court judge in the case even made the point that "the scope of any proposed remedy must be carefully crafted so as to ensure that the enjoining conduct falls within the [penumbra] of

behavior which was found to be anticompetitive." *(transcript of Scheduling Conference before the Honorable Colleen Kollar-Kotelly, September 28, 2001, at 8.)* It would seem that specifically prohibiting the company from engaging in the activities that were found to be monopolistic would meet this criterion.

As for enforceability, included in the unprecedented provisions of the decree is the creation of an independent three-person technical committee to monitor Microsoft's compliance with the agreement. The committee will reside at Microsoft headquarters and that will have complete access to all Microsoft facilities, records, employees and proprietary technical data. This includes the source code for Windows, which some have pointed out is the equivalent of having access to the "secret formula" for Coca Cola.

In addition to the Technical Committee, the Department of Justice and each of the nine states that have so far settled with the company, will all have the power to monitor Microsoft's compliance and to seek remedy if the company fails to meet the terms of the decree. Microsoft has also agreed to create and implement an internal compliance program to educate their managers and employees about the different restrictions and obligations the decree imposes on them. All of this goes far beyond what the Court of Appeals originally required.

It seems none of this is good enough for those who are determined to pursue this case until the bitter end – an end that could mean bitter consequences for this nation's high-tech industry, not to mention the economy as a whole. The claims that survived the Court of Appeals decision were, and remain, very narrow. The idea of splitting the company apart had been dismissed. The company's "tying" practices were found to be legal. All that was left were proposed measures such as forcing Microsoft to sell Windows software without including its Web browser, instant messaging or media player applications – an indication of just how trivial this case has become in terms of "harm to consumers" when measures such as these become the bargaining chips.

One Microsoft opponent has said that you assume consumer harm results from monopolization. But it is difficult to see how consumers might benefit from having the Media Player or Instant Messaging applications deleted from their software. Microsoft did in fact offer a browserless version of Windows at one point during litigation. Nobody wanted it.

It is important to remember that decrees in civil antitrust cases like this are designed to remedy, not to punish. Microsoft was found to be engaged in illegal business practices, it has been prohibited from those practices in the future, and faces severe repercussions should it fail to meet these prohibitions. And yet, opponents continue to complain that the decree is useless because it will have no "material" impact on Microsoft's business.

Microsoft's opponents like to say there are loopholes in the loopholes, and speak forebodingly of the years of additional litigation that will result. The irony here is that they are the ones refusing to settle the case, they are the ones prolonging the litigation,

and they are the ones finding fault with enforcement provisions that are unprecedented in a conduct decree such as this.

The Department of Justice, which represents the public and is the principal interpreter of the federal antitrust laws to the Judiciary, has achieved a powerful settlement and wants to move on. There are a few attorneys general with questionable expertise who want to prolong the uncertainty clouding the marketplace. They should recede from the federal action, and let the private sector litigants get back to creating jobs instead of enriching lawyers.

If this case is truly about protecting consumers from illegal and monopolistic business practices, then that has been accomplished in a reasonable, enforceable and unprecedented manner through the consent decree negotiated between Microsoft and the Justice Department and supported by nine States. If, on the other hand, this case has turned into an opportunity to prolong litigation and wring additional dollars out of Microsoft, it is in the best interest of the public, the economy, and indeed the judiciary to bring this case to an end as precipitously as is possible.

Sincerely,

C. Boyden Gray